

*in opinion*  
March 18, 1955.  
*& also in 260A*  
George F. Nelson  
Assistant Attorney General

Attorney General's

Mr. David Deans, Jr., Chairman  
Special Committee  
Municipal and County Government  
House of Representatives  
Concord, N. H.

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CONCORD, N.H.

Dear Mr. Deans:

Your inquiry of March 15, 1955 asking whether under Revised Laws, chapter 66, section 13, paragraph VII, a town or city may forbid hawkers and peddlers from plying their wares in a city or town I advise as follows.

Broadly speaking the answer is "no".

"A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them'. Jay Burns Baking Co. v. Bryan, 264 U. S. 504, 513. Liggett Co. v. Baldrige, 278 U. S. 105, 113. No more can a municipality." State v. Moore, 91 N. H. 16, 23)

This does not mean that hawkers and peddlers may be entirely free from regulations because they are licensed. For instance, a hawker's and peddler's license does not permit the individual to occupy a traveled portion of a street or highway for the purpose of setting up shop temporarily and municipalities are without power to grant such permission. Normally, a hawker's and peddler's license contains no provision defining or regulating the manner in which he shall conduct his business. He is under no specified restrictions and is authorized to peddle from place to place, within the city or town limits, and to carry with him upon his cart articles for sale. He is not required to move continually but may stop for the purpose of making or endeavoring to make sales. If there is anything offensive in the business itself or if those engaged in it so conduct themselves as to obstruct the streets or become nuisances the manner of doing business may be controlled by regulations. A hawker or peddler may under his license go from house to house and from place to place in search of customers; and, if there is no statute or ordinance to the contrary he may solicit customers on the street but he cannot stop an unreasonable length of time for that purpose, or for the purpose of making a sale. In general a city is not entitled to prohibit the sale on city streets of articles traffic in which is not prohibited by law if the individual is duly licensed.

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A municipality may validly prohibit the sale of articles in specifically set out portions of the municipality which constitute highly congested areas in order to avoid the hampering of traffic movement which would be caused by the use of the streets for such purposes and may pass ordinances to prohibit the obstruction of the free use of the sidewalks as a matter of safety, comfort and convenience to inhabitants where there is congestion.

While highways are public they are subject to public control. The public have no vested rights to their use, and it follows that the use is such as the state permits, and that any conditions of permission are proper, provided they are not forbidden by the Constitution. State v. Cox, 91 N. H. 137, 141)

"Of the guaranteed rights that of equality holds high place in the list. Discrimination of one citizen in favor of another is beyond legislative authority to make, whether legislation expresses it in terms or produces it in result. Classification must be reasonably adapted to secure a legitimate public interest. Opinion of the Justices, 85 N. H. 562, 564, and cases cited. . . . 'The fundamental rule of classification is that it shall not be arbitrary, must be based on substantial distinctions and be germane to the purpose of the law.' Kelley v. Boyne, 239 Mich. 204.

"The right to property includes the right to acquire it as well as to possess it. 'No proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.' People v. Marx, 99 N. Y. 377, 386, cited in State v. Ramseyer, 73 N. H. 31, 35

" . . . 'In drawing the line which separates the field of arbitrary interference with protected rights of property and freedom in personal action, from that of protective legislation in behalf of public safety, each case must fall on one or the other side in accordance with its particular circumstances.' State v. Feingold, 77 Conn. 326" Woolf v. Fuller, 87 N. H. 64, 72, 73

A city or town ordinance is invalid when it is repugnant or inconsistent with a general statute of the state.

In short, as stated in State v. Angelo, 71 N. H. 224, 228 a person holding a license under the statute may sell

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throughout the whole state as a hawker and peddler any goods, wares, or merchandise the sale of which is not prohibited by law.

The provisions of paragraph VII of section 13 of chapter 66 while pertinent and providing a basis for local regulation if exercised with regard to the constitutional rights hereinbefore enumerated do not appear to be as germane to the problem as paragraph XV of the same section which by its terms authorizes city councils to make ordinances, rules, regulations and by-laws "relative to licensing and regulating . . . hucksters, peddlers, hawkers and common victualers." While the state license renders the city or town license requirement void the power for cities to regulate reasonably under paragraph XV of said section 13 of chapter 66 of the Revised Laws and for the towns to so regulate hawkers and peddlers under the provisions of Revised Laws, chapter 59, section 15, remains. The necessary corollary of a state license is that the person licensed may not be subjected by a municipality to total exclusion from the lawful business for which he is licensed.

In connection with the sale by hawkers and peddlers of artificial flowers or miniature flags, however, your attention is invited to the provisions of Revised Laws, chapter 188, sections 18, 19 and 20 as amended by Laws of 1953, chapter 67.

Very truly yours,

George F. Nelson  
Assistant Attorney General

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